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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JOHN EDWARD ARREDONDO, JR., Defendant and Appellant.	E053020 (Super.Ct.No. FCH07575) OPINION

APPEAL from the Superior Court of San Bernardino County. Jon D. Ferguson, Judge. Affirmed in part, reversed in part with directions.

Allen G. Weinberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Scott C. Taylor, Gil Gonzalez, and Jennifer A. Jadovitz, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant John Edward Arredondo, Jr., appeals after he was convicted of several offenses involving two incidents of breaking into women's homes and sexually assaulting them. On appeal, defendant contends the trial court erred in imposing two separate one-strike sentences with respect to counts that occurred on the same occasion. The People concede the error, but argue that a determinate sentence may be imposed on whichever count is not used for one-strike purposes. Additional errors in the abstract of judgment must be corrected. We affirm the convictions, but remand for resentencing, and with directions to correct the abstract of judgment.

FACTS AND PROCEDURAL HISTORY

Counts 1 and 2 of the third amended information related to offenses defendant had committed against Theresa Z. in 2005. The victim was asleep in her bedroom at 3:00 a.m. when she awoke to find a man standing over her. He had his head wrapped, and he wore heavy work gloves. The victim started to scream, and the man put his hand over her mouth. Fearing for her children, and also thinking that the man might kill her, the victim flailed, kicked and screamed again. Suddenly, the man ran away. The victim called police.

The officers who responded found a beer can outside the back door of the victim's bedroom. The can had defendant's fingerprints on it.

Defendant was charged with one count of first degree residential burglary (count 1) and assault with intent to commit rape, sodomy or oral copulation (count 2).

After defendant's arrest for the 2005 crimes, he was also charged with an earlier incident that had happened in 2002. Iris S. was at home in her bedroom, while her husband was still awake in the living room. The victim had her infant child in bed with her, when she was awakened by someone sucking on her breast. At first she thought it was her husband, but then realized that it was a stranger, later identified as defendant. Defendant told the victim that she was beautiful and that he had been watching her. She asked him why he was there. Defendant started to remove the victim's clothes and rubbed her body. She resisted when he started to pull off her underwear, but he pulled harder and removed them. Defendant used his hand to masturbate the victim, which was physically painful for her. Defendant then made the victim sit up on the edge of the bed and, pulling her head, forced her to orally copulate him. The victim did not cry out because she was afraid defendant would hurt the baby or her husband. Defendant then moved the victim's hand onto his penis, and made her masturbate him until he ejaculated on her chest. Defendant hugged the victim and said the situation was "weird," because he had a wife and children.

After defendant left, the victim went to the hospital. The forensic examination showed the victim had sustained genital abrasions and a tear consistent with a penetration injury. Samples of the ejaculate were used to obtain a DNA profile for the perpetrator. That profile was later matched to defendant.

The 2002 events resulted in charges of forcible oral copulation (count 3), sexual penetration by a foreign object (count 4) and first degree residential burglary (count 5).

Defendant testified in his own behalf at trial. Defendant admitted he had several prior arrests for peeping. He blamed this activity on his abuse of drugs; he would feel agitated and would walk around an apartment complex. Curiosity led him to look into the windows of people's apartments. Defendant also had prior convictions of residential burglary with intent to commit theft, commercial burglary, receiving stolen property and possession of a fraudulent check.

As to the charges for the 2002 incident, defendant claimed he could not have had sex because he had suffered a work injury to his testicles. He lost one testicle and the other was quite painful. He filed a workers' compensation claim and underwent treatments between March 2002 and July 2002. Although he was physiologically able to achieve erection by December 2002 (the charged offenses in counts 3, 4 and 5 took place in December 2002), he was still undergoing therapy to overcome his fear of sexual relations with his wife.

Defendant did admit, however, going to the victim's apartment complex at 6:00 a.m. in December 2002. He was drawn to the victim's apartment because it had a nice view of the sunrise. Defendant claimed that, at one point, he turned and looked into the window and saw the victim make eye contact with him as she was touching herself. Defendant said that he started to leave, but the victim opened the sliding glass door and invited him inside. Defendant indicated that all the sexual contacts with the victim were consensual.

Defendant denied any connection to the 2005 offenses, and said that he never broke into the victim's home. He explained his fingerprint on the beer can outside her home by saying that he had gone to see a house that was for rent in the neighborhood.

The jury found defendant guilty as charged on all five counts. The jury also found true allegations as to counts 3 and 4 that each was committed during the course of a first degree residential burglary, and that another person other than an accomplice was present (one-strike allegations). The court, in a bifurcated hearing, found true that defendant had previously been convicted of a serious or violent strike felony offense.

The court sentenced defendant to a determinate term of 12 years (six years doubled) on count 1. The sentences on counts 2 and 5 were stayed pursuant to Penal Code section 654. Defendant also received a consecutive indeterminate term of 100 years to life; the court imposed terms of 25 years to life on each of counts 3 and 4, under the one strike law for sex offenses, doubled to 50 years to life under the three strikes law.

Defendant appeals, contending that the trial court erred in imposing two separate sentences under the one strike law.

ANALYSIS

I. Standard of Review

Defendant urges that, under the version of the one strike law in effect when he committed the crimes in 2002, he should be subject only to a single one-strike sentence (on counts 3 & 4), instead of two one-strike sentences, as imposed by the trial court. This

question raises an issue of statutory interpretation, which we review de novo. (*People v. Love* (2005) 132 Cal.App.4th 276, 284.)

II. Defendant Must Be Resentenced

Defendant was convicted in counts 3 and 4 of crimes committed in 2002: forcible sexual penetration of the victim (Pen. Code, § 289, subd. (a)(1)) (count 4), and forcible oral copulation of the same victim (Pen. Code, § 288a, subd. (c)(2)) (count 3). There was no specific testimony as to how much time, if any, elapsed between the two acts; thus, defendant argues, both convictions stemmed from the same incident.

At the time of the offenses in 2002, Penal Code former section 667.61, subdivision (g), provided: "The term specified in subdivision (a) or (b) shall be imposed on the defendant once for any offense or offenses committed against a single victim during a single occasion. . . . Terms for other offenses committed during a single occasion shall be imposed as authorized under any other law, including Section 667.6, if applicable." The crux of the matter is the meaning of the term, a "single occasion."

In *People v. Jones* (2001) 25 Cal.4th 98, the California Supreme Court construed a "single occasion" to mean "committed in close temporal and spatial proximity." (*Id.* at p. 107.) In *Jones*, the assailant grabbed a woman by the neck and forced her into a garage, where he then forcibly put her into the back seat of a car. There, he pulled her hair and hit her repeatedly, first forcing her to orally copulate him, then raping her, and finally committing three acts of forcible sodomy. The crimes took place over a period of about one and one-half hours. The court held that the events constituted a "single occasion"

under Penal Code former section 667.61, because they had taken place "during an uninterrupted time frame and in a single location." (*People v. Jones, supra,* 25 Cal.4th 98, 107.) Here, all the 2002 offenses took place in one location, the victim's bedroom, within a very short time frame. Defendant manually penetrated the victim's vagina as she was lying on the bed. Then he made her sit up on the edge of the bed and orally copulate him. There is no evidence as to any lapse of time between the two events constituting counts 3 and 4. Both offenses took place in close temporal and spatial proximity.

The Attorney General concedes that the trial court should only have imposed a single one strike law sentence, and agrees the matter must be remanded for resentencing. The parties disagree, however, whether the trial court may impose consecutive sentences as to counts 3 and 4 upon remand. Defendant urges, in view of the holding that the offenses in counts 3 and 4 took place on a "single occasion," for purposes of Penal Code former section 667.61, that the offenses are not subject to consecutive sentencing under Penal Code section 667.6, which applies when specified sex offenses are committed against "the same victim on separate occasions." (Pen. Code, § 667.6, subd. (d).) The Attorney General asserts that the "separate occasions" language is to be distinguished from the "single occasion" term contained in Penal Code former section 667.61, subdivision (g).

In 2006, the one strike law was amended by an initiative measure to remove the "single occasion" language, with the apparent intent of abrogating the holding in *People*

v. Jones. (Prop. 83, § 12, approved Nov. 7, 2006, eff. Nov. 8, 2006.) The current statute, Penal Code section 667.61, subdivision (i), now provides: "For any offense specified in paragraphs (1) to (7), inclusive, of subdivision (c) . . . the court shall impose a consecutive sentence for each offense that results in a conviction under this section if the crimes involve separate victims or involve the same victim on separate occasions as defined in subdivision (d) of Section 667.6."

The California Supreme Court in *People v. Jones*, *supra*, had held that the meaning of a "single occasion" in Penal Code former section 667.61, subdivision (g), had a different import from the term "separate occasions," as used in Penal Code section 667.6, subdivision (d). As used in Penal Code section 667.6, subdivision (d), the term "separate occasions" denoted the concept "whether the defendant had a reasonable opportunity for reflection." (*People v. Jones*, *supra*, 25 Cal.4th 98, 105.) A finding that a defendant commits sex crimes on separate occasions "does not require a change in location or an obvious break in the perpetrator's behavior . . . ." (*Id*. at p. 104.)

In *People v. Fuller* (2006) 135 Cal.App.4th 1336, as in *People v. Jones*, *supra*, the prior version of Penal Code section 667.61 applied. The defendant had been convicted of three counts of rape, but the rapes had all occurred on a "single occasion." The one strike law represents an alternative, harsher, sentencing scheme, and not an enhancement. Punishment under either the one strike law or the determinate sentencing law could be imposed, but not both for the same count. The *Fuller* court held that the defendant could be subjected only to a single one-strike sentence, but as to all other counts, the trial court

should sentence the defendant under the determinate sentencing law. (*People v. Fuller*, *supra*, 135 Cal.App.4th 1336, 1343.)

Penal Code section 667.6, subdivision (d), applies to sentences imposed for certain sex offenses under the determinate sentencing law, to require full consecutive sentences for such qualifying offenses. As noted, subdivision (d) provides that "[a] full, separate, and consecutive term shall be imposed" for each qualifying crime, "if the crimes involve separate victims or involve the same victim on separate occasions." The provision also explains the meaning of "separate occasions," as follows: "In determining whether crimes against a single victim were committed on separate occasions under this subdivision, the court shall consider whether, between the commission of one sex crime and another, the defendant had a reasonable opportunity to reflect upon his or her actions and nevertheless resumed sexually assaultive behavior. Neither the duration of time between crimes, nor whether or not the defendant lost or abandoned his or her opportunity to attack, shall be, in and of itself, determinative on the issue of whether the crimes in question occurred on separate occasions." (*Ibid*.)

Here, the trial court did make a finding which indicated that it regarded the offenses in counts 3 and 4 as occurring on separate occasions, under the "reasonable opportunity to reflect" standard. The court stated: "Even if I were to exercise my discretion, I think they're separate assaults, separate indignities to the victim, certainly separate incidents of degradation and terror inflicted on her. And given the history of the defendant . . . and the facts of this case . . . and including [defendant's] questionable

description of those events, the Court does not feel that it would be appropriate exercise and discretion [*sic*] to run those counts concurrently even if the Court had the discretion to do so." As the prosecutor argued at sentencing, "All it requires is an opportunity to reflect. I'm not going to rehash the facts of this particular case. The Court saw them. The fact is, the original sexual assault under one of the code sections occurred while she was l[]ying on the bed. At that point in time, she was pulled up. There was, in fact, a brief pause before the oral copulation started. [¶] Under *People versus Grove* [*sic*: *People v. Groves* (2003) 107 Cal.App.4th 1227, 1230-1231], *People versus Corona* [*People v. Corona* (1988) 206 Cal.App.3d 13, 18], and *People versus Jackson* [*People v. Jackson* (1998) 66 Cal.App.4th 182, 190-193], that is, in fact, a de[ ]facto opportunity to reflect under the law."

However, because it has otherwise been determined that both counts 3 and 4 occurred on a "single occasion," under Penal Code former section 667.61, in part because there was no evidence of any appreciable lapse of time between the two offenses, defendant urges that the court may not find that the offenses occurred on "separate occasions" under Penal Code section 667.6, subdivision (d). Defendant relies on *People v. Pena* (1992) 7 Cal.App.4th 1294. The *Pena* court, at page 1316, found that other cases "strongly suggest appellant did not have a 'reasonable opportunity to reflect' between his acts of rape and forcible oral copulation. As was the case in *People v. Corona*, nothing in the record before this court indicates *any* appreciable interval 'between' the rape and oral copulation. After the rape, appellant simply flipped the victim over and orally copulated

her. The assault here was also continuous. Appellant simply did not cease his sexually assaultive behavior, and, therefore, could not have 'resumed' sexually assaultive behavior."

Since the decision in *Pena*, however, other courts have questioned its reasoning, to the extent that it (and other cases) appeared to require some change in location or obvious break in activity to constitute a "separate occasion." For example, *People v. Irvin* (1996) 43 Cal.App.4th 1063, cautioned against viewing violent sexual acts through the same lens as consensual sexual acts: "Consensual sex may include times when the participants go back and forth between varied sex acts, which they may consider to be one sexual encounter. By contrast, a forcible violent sexual assault made up of varied types of sex acts committed over time against a victim, is not necessarily one sexual encounter. Such a sexual assault . . . is not motivated by sexual pleasure. Instead, it is frequently intended to degrade the victim. . . . Therefore, at sentencing a trial court could find the defendant had a 'reasonable opportunity to reflect upon his or her actions' even though the parties never changed physical locations and the parties 'merely' changed positions." (*Id*. at p. 1071; see also *People v. King* (2010) 183 Cal.App.4th 1281, 1325, fn. 26 [quoting *Irvin*].)

Upon remand for resentencing, the trial court will select either count 3 or count 4 (but not both) for one-strike treatment, and will impose a determinate sentence as to the remaining count. The court will then have the opportunity to decide whether the determinate offense occurred on a "separate occasion" (i.e., whether defendant had a reasonable opportunity to reflect before continuing the sexual assault) from the one-strike

offense, and thus whether it should be sentenced consecutively to the one-strike offense, under Penal Code section 667.6, subdivision (d).

III. The Abstract of Judgment Must Be Corrected

Defendant points out several errors in the abstract of judgment which should be corrected. First, the abstract states that counts 3 and 4 were committed in 2005, when they were actually committed in 2002. The Attorney General notes the same error with respect to count 5.

The offenses listed for counts 3 and 4 use improper and potentially confusing upper case lettering, e.g., "PC 288A(C)(2)" and "PC 289(A)(1)." The applicable Penal Code sections and subdivisions should be abbreviated to indicate correct lower case provisions: "288a(c)(2)" (for Pen. Code, § 288a, subd. (c)(2)), and "289(a)(1)" (for Pen. Code, § 289, subd. (a)(1)).

Finally, the court checked box number 5., "LIFE WITH THE POSSIBILITY OF PAROLE," in addition to box 6.c., "50 years to Life" on counts 3 and 4. Box 6.c. correctly reflects the type of life term imposed on defendant (although, as we have held, only one such term, rather than two, may be imposed).

The Attorney General agrees that these errors should be addressed and corrected upon remand.

DISPOSITION

The sentence is reversed and remanded for resentencing. The trial court may impose only a single one-strike sentence as between counts 3 and 4; as to all the

remaining counts, including the count not selected as a one-strike offense, sentence is to be imposed under the determinate sentencing law. The trial court must evaluate whether the determinate count (either count 3 or count 4, whichever is not selected for one-strike sentencing) occurred on a "separate occasion" from the one-strike offense, under the "reasonable opportunity to reflect" standard of Penal Code section 667.6.

Upon resentencing, the court shall issue a new abstract of judgment reflecting the sentence imposed, also being sure to correct these errors: (1) counts 3, 4 and 5 were committed in 2002, not 2005; (2) Penal Code sections for counts 3 and 4 may be abbreviated using proper lower case designations (288a(c)(2) and 289(a)(1), respectively); and (3) checking one of the alternatives under box 6. (not box 5.) to describe the life term imposed pursuant to the one strike law.

After preparation of a new abstract of judgment upon resentencing, with the noted corrections, the clerk of the superior court is directed to forward a certified copy to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

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MCKINSTER
J.

We concur:

RAMIREZ
P.J.

RICHLI
J.